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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re H.G., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

KATHLEEN P. et al.,

Defendants and Appellants.

D049344

(Super. Ct. No. J508618D)

APPEAL from an order of the Superior Court of San Diego County, Gary M.
Bubis, Commissioner. Dismissed.

Kathleen and William P., a maternal aunt and uncle of H.G., appeal the summary
denial of their petition for modification under Welfare and Institution Code section 388.¹
We dismiss the appeal as moot.

¹ Unless specified, further statutory references are to the Welfare and Institutions
Code.

FACTUAL AND PROCEDURAL BACKGROUND

On March 12, 2004, three-year-old H.G. was taken into protective custody by the El Cajon Police Department. The Agency filed a petition under section 300, subdivisions (b) and (g) alleging H.G. was at serious risk of harm because her parents, Mary H. and Simon G., abused drugs and alcohol, did not provide H.G. adequate care, and left her without support. The court sustained the petition, removed H.G. from parental custody, and placed her with Jean B., a maternal aunt. We have extensively detailed the factual and procedural background of this case in *In re H.G.* (2006) 146 Cal.App.4th 1, 4-8 (*H.G.*), and in our unpublished opinion, *In re H.G.* (Apr. 11, 2007, D049724). Here, we focus on facts pertinent to this appeal.

During the time H.G. lived with Jean, Kathleen helped her with H.G.'s care. In October and December 2004, Kathleen informed the court that she and her husband, William, wanted to adopt H.G. However, the San Diego County Health and Human Services Agency (the Agency) discovered Kathleen had a nine-year-old felony conviction for possession of a controlled substance, and did not permit Kathleen to have unsupervised contact with H.G.

In April 2005, the court returned H.G. to Mary's custody. In August, Mary relapsed and disappeared with H.G. The Agency located and detained H.G. on September 27. Kathleen, Jean, and H.G.'s paternal grandparents each asked to care for her. The Agency assessed the homes of Jean and the grandparents, and placed H.G. with her grandparents.

On February 1, 2006, due to concerns about Simon's presence in the grandparents' home, the Agency removed H.G. and placed her in a nonrelative prospective adoptive home. (*H.G.*, *supra*, 146 Cal.App.4th at pp. 6-7 & fn. 3.) The Agency filed a section 387 petition to change H.G.'s level of placement from relative care to nonrelative foster care. Kathleen asked the social worker to place H.G. with her. When the social worker reminded Kathleen of her criminal history and noncompliance with Agency rules, Kathleen responded, "You don't know what the fuck you're talking about, bitch."

On February 24, 2006, the social worker submitted a formal request to another Agency unit for an evaluation of Kathleen and William's home. Kathleen and William provided the final reference necessary to complete the home study on May 23.

On April 13, 2006, the court granted the Agency's section 387 removal petition, and immediately proceeded to a section 366.26 hearing. The court terminated parental rights and ordered a permanent plan of adoption. Mary and Simon appealed the orders and judgment of the court. (*H.G.*, *supra*, 146 Cal.App.4th at pp. 17-18.)

On June 7, 2006, Kathleen and William filed a section 388 petition asking the court to modify its order placing H.G. with nonrelative caretakers. They asserted the court changed the level of placement without considering other relatives who sought to care for H.G., and asked the court to place H.G. with them for adoption. As changed circumstances, Kathleen and William alleged their home study was complete and had been submitted to the director to decide whether to exempt Kathleen's felony conviction from disqualifying her for placement. They asserted a modification of the prior order

was in H.G.'s best interests because she would be raised in a loving, stable two-parent home, educated, and protected from Mary and Simon.

The court found the petition stated a prima facie case and set a hearing for June 14, 2006. On that date, the social worker told the court that the request for a criminal exemption was reviewed by the supervisor and the chief, and "they have both denied." The court directed the social worker to provide "written evidence" concerning the grant or denial of a criminal record exemption for Kathleen.

On June 28, 2006, the social worker reported that Kathleen and William's home study was complete and had been submitted for management review. The social worker stated, "Although the actual home may be approvable because the crimes that [Kathleen and William] committed are exemptible, the Agency has chosen not to place with [Kathleen] due to her history of noncompliance with the Agency's rules as well as documentation of several explosive anger episodes between [Kathleen] and Agency employees." The Agency was currently evaluating two other relatives and one nonrelative for adoptive placement because the prospective adoptive family with whom H.G. had been placed had decided not to adopt her.

The Agency also reported that H.G. completed a psychological evaluation with M. Bruce Stubbs, Ph.D. Dr. Stubbs diagnosed H.G. with reactive attachment disorder and recommended H.G. have no contact with the adults previously involved in her care. The court, concerned about placing H.G. with another family she did not know, asked for clarification. Dr. Stubbs reiterated that his recommendation for no contact included family members and friends of the family.

On July 26, 2006, county counsel informed the court that Kathleen and William's home study was in progress and had not been approved or disapproved. However, even if the home study were approved, the Agency did not intend to place H.G. with Kathleen and William for adoption. Kathleen told the court she had not been informed of the Agency's placement decision "one way or the other."

The court denied an evidentiary hearing on the modification petition. The court reasoned that it did not appear the Agency would approve the home for placement and the court could not override the Agency's decision, especially with respect to a criminal records exemption. In determining H.G.'s best interests, the court relied on Dr. Stubbs's opinion that H.G. should not have contact with relatives because of her special needs.

APPELLATE PROCEEDINGS

On December 11, 2006, we held that the juvenile court did not exercise its independent judgment to consider the appropriateness of relative placement under section 361.3. (*H.G.*, *supra*, 146 CalApp.4th at p. 15.) We reversed the April 13, 2006 orders removing H.G. from her placement with the grandparents and directed the trial court to hold a new section 387 hearing to determine whether relative placement was no longer appropriate under section 361.3. The judgment terminating parental rights was also necessarily reversed. (*H.G.*, *supra*, at pp. 18-19.) On March 21, 2007, we asked the parties to submit supplemental briefing addressing whether this appeal should be dismissed as moot.

DISCUSSION

A

Introduction

Kathleen and William ask us to overturn this court's holding in *In re S.W.* (2005) 131 Cal.App.4th 838, in which we held that the juvenile court has no authority to override the Agency's denial of a criminal records exemption. (*Id.* at pp. 851-852.) They contend the juvenile court erroneously denied a hearing on their petition for modification because it did not recognize the scope of its jurisdiction to review the Agency's denial of a criminal record exemption under section 361.4.

Kathleen and William further assert the Agency disregarded the Legislature's clearly expressed preference for relative placement when the social worker did not make diligent efforts to determine the propriety of their home for placement despite their repeated requests for consideration. (§ 361.3; Fam. Code, § 7950.) They also contend they were denied a fair hearing on their section 388 petition because the Agency did not provide the court with sufficient information to consider factors listed in section 361.3, and were denied the opportunity to contest disputed facts regarding H.G.'s best interests.

The Agency responds the court did not abuse its discretion when it summarily denied a hearing on the modification petition. It asserts Kathleen and William did not state a prima facie case for modification when they alleged the home assessment worker completed her report and gave it to the director to sign a criminal records exemption. The Agency contends the court has no discretion to override the Agency's denial of a criminal record exemption, and argues Kathleen and Williams' only recourse is through

the Agency's administrative grievance process. It asserts section 361.3 no longer applies in this case because parental rights were terminated before Kathleen and William filed their petition for modification, and the court's discretion to review the Agency's post-termination placement decisions is limited to determining whether the Agency abused its discretion in placing the child.

Minor's counsel joins the Agency's arguments on the merits, but argues the appeal should be dismissed as moot. Kathleen and William, and the Agency contend the appeal should not be dismissed. For the reasons stated below, we dismiss the appeal as moot.

B

Kathleen and William Seek Modification Of An Order That No Longer Exists; Accordingly, This Court Cannot Grant Effective Relief

Minor's counsel contends the appeal is moot because this court's reversal in *H.G.*, *supra*, 146 Cal.App.4th 1, places the dependency case in the same posture as it was before the appealed and reversed judgment was entered. (*Barnes v. Litton Systems, Inc.* (1994) 28 Cal.App.4th 681, 683.) Minor's counsel argues because the original order was reversed, the controversy created when Kathleen and William challenged the April 13, 2006 order no longer exists.

The Agency, joined by Kathleen and William, argue the appeal should not be dismissed as moot because the reversal ordered in *H.G.*, *supra*, 146 Cal.App.4th 1 involved different parties and different issues, and the issues presented in this appeal remain "active controversies." Citing this court's decision in *In re Miguel E.* (2004) 120 Cal.App.4th 521 (*Miguel E.*), Kathleen and William contend that unless dependency jurisdiction is terminated, a child's placement with one relative does not render moot a

pending appeal from the denial of placement with another relative. (*Id.* at p. 550.)

Kathleen and William argue that even if moot, this appeal presents issues of broad public interest that are likely to recur, and urge us to exercise our discretion to review the pending case. (*In re Christina A.* (2001) 91 Cal.App.4th 1153, 1158.)

An appellate court will not review questions which are moot and only of academic importance, nor will it determine abstract questions of law at the request of a party who shows no substantial rights can be affected by the decision either way. (*Keefer v. Keefer* (1939) 31 Cal.App.2d 335, 337; *Save Tara v. City of West Hollywood* (2007) 147 Cal.App.4th 1091, 1114.) An appeal becomes moot when, through no fault of the respondent, the occurrence of an event renders it impossible for the appellate court to grant the appellant effective relief. (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316; *Consolidated Vultee Aircraft Corp. v. United Auto., etc.* (1946) 27 Cal.2d 859, 863.) The reviewing court decides on a case-by-case basis whether subsequent events in a juvenile dependency matter make a case moot and whether its decision would affect the outcome in a subsequent proceeding. (*In re Dylan T.* (1998) 65 Cal.App.4th 765, 769.)

Here, no effective relief can be afforded Kathleen and William as to the court's order of April 13, 2006. That order no longer exists. (*In re H.G., supra*, 146 Cal.App.4th at p. 15.) This case differs factually and procedurally from *Miguel E., supra*, 120 Cal.App.4th 521. In that case, the caregiver grandparents directly appealed an order under section 387 removing the child from their care. This court held the subsequent return of a child to her father did not render moot the grandparents' appeal because the section 387 order, if left undisturbed, might impede the grandparents' visitation or

preclude the court from returning the child to their care if placement with the father did not succeed. (*Id.* at p. 550.)

In contrast, this case does not involve a direct appeal by a caregiver relative from an order under section 387 during the reunification period. Here, noncaregiver relatives appeal a summary denial of a section 388 petition filed after parental rights were terminated. The intervening event was not the return of the child to the parent, but a decision by this court that H.G.'s removal from her caregiver relatives was an abuse of discretion. (*H.G.*, *supra*, 146 Cal.App.4th at p. 15.) Unlike the section 387 order in *Miguel E.*, *supra*, 120 Cal.App.4th 521, the order removing H.G. from relative care has not been left undisturbed, it no longer exists. Therefore, even were we to conclude the court erred when it denied an evidentiary hearing on Kathleen and Williams' petition to modify the April 13, 2006 order, we cannot grant effective relief. What order would the court modify?

Kathleen and William, and the Agency argue this appeal involves different parties and different issues than were presented in *H.G.*, *supra*, 146 Cal.App.4th 1 and the controversies remain pertinent to the underlying dependency case. However, Kathleen and William are not de facto parents, and have only limited standing as "person[s] having an interest in [the] child" to petition the court to change, modify or set aside a prior order. (§ 388, subd. (a); see, e.g., *In re Hiren C.* (1993) 18 Cal.App.4th 504, 512.) They are not parties to the underlying dependency case. (See, e.g., *In re Miguel E.*, *supra*, 120 Cal.App.4th at p. 539 [unless a relative has status as a de facto parent, the relative is not a party of record].) Were this court to allow this appeal to proceed in the absence of a

modifiable order, it would have the effect of transforming a limited proceeding under section 388 into an independent right of action by a nonparty, which it is not.

Kathleen and William assert that a lack of resolution of the issues raised in this appeal will affect their substantial rights in the remanded proceedings under *H.G., supra*, 146 Cal.App.4th 1, and therefore the appeal is not moot. Specifically, Kathleen and William contend they will be prevented from asking the court to consider their home assessment under section 361.3, if completed, or to review the Agency's action concerning their criminal records exemption² because they will not have notice of the section 387 hearing on remand.

² Were we to review this issue on the merits, we would decline to revisit this court's holding that the juvenile court does not have the authority to place a child with a relative in the face of the Agency's denial of a criminal records exemption for that relative. (*In re S.W., supra*, 131 Cal.App.4th at pp. 851-852.)

Because of the parties' confusion concerning the administrative remedy cited in *In re S.W., supra*, 131 Cal.App.4th at page 848, we reiterate that Health and Safety Code sections 1526 and 1551 and California Code of Regulations, title 22, sections 80040 and 89240 apply to administrative reviews of a denial of a criminal records exemption. Health and Safety Code section 1522, governing fingerprint identification and criminal records review, applies to the relative caregiver approval process. (§ 361.4, subd. (d)(2); see *In re Summer H.* (2006) 139 Cal.App.4th 1315, 1330 ["The intent of the Legislature is to clarify that California's relative caregiver approval process employs the same standards used to license foster care homes."].)

If the Agency denies a foster care applicant a license or special permit, Health and Safety Code section 1526 applies. It provides: "Immediately upon the denial of any application for a license or for a special permit, the state department shall notify the applicant in writing. Within 15 days after the state department mails the notice, the applicant may present his written petition for a hearing to the state department. Upon receipt by the state department of the petition in proper form, such petition shall be set for hearing. The proceedings shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the state department has all the powers granted therein." (See also Health & Saf. Code, § 1551 [governing suspensions and revocations of foster care licenses]; Cal Code Regs., tit. 22, §§ 80040, 89240.)

Kathleen and William ignore the fact that as nonparties to the underlying dependency proceeding, they had no right to notice of the April 13, 2006 hearing and orders,³ and yet filed a petition to modify those orders under section 388. Because we have reversed the section 387 order and the judgment terminating parental rights, Kathleen and William are in the same position as before they filed this appeal, and the dismissal of this appeal does not affect any substantial rights.⁴ (*Keefer v. Keefer, supra*, 31 Cal.App.2d at p. 337; *Save Tara v. City of West Hollywood, supra*, 147 Cal.App.4th at p. 1114.) "An appeal is prevented from becoming moot only if the rights of the parties are directly affected by its determination. Their interest must be 'immediate . . . and not a remote consequence of the judgment.' [Citations]." (*Consolidated Vultee Aircraft Corp. v. United Auto. etc., supra*, 27 Cal.2d at p. 865.)

Finally, Kathleen and William request we exercise our inherent discretion to resolve recurring issues of public importance raised in this appeal. (*In re William M.*

³ The Legislature does not require the court to provide formal notice of a section 387 removal hearing to the child's relatives. (§§ 387, 290.1, 291; Cal. Rules of Court, rules 5.570(e), 5.524(e); but see § 361.3, subd. (d) ["whenever a new placement . . . must be made, consideration for placement shall again be given as described in [section 361.3] to relatives who have not been found to be unsuitable"].)

⁴ Because the judgment terminating parental rights has been reversed, Kathleen and William may contact the social worker to seek preferential relative placement under section 361.3. They may apply for a criminal records exemption under California Code of Regulations, title 22, section 89219.1, subdivision (a), and seek administrative review of any adverse action by the Agency upon proper notice. If necessary and appropriate, Kathleen and William may file a section 388 petition. And, in the event parental rights are terminated, Kathleen and William may file an application to adopt H.G. under Family Code sections 8714 and 8714.5. (See Cal. Code Regs., tit. 22, §§ 35177, 35179.1, 35180, 35181, 35183; see also Fam. Code, § 8712, subds. (a), (b); Cal Code Regs., tit. 22, § 35184.)

(1970) 3 Cal.3d 16, 19, 23; *In re Christina A.*, *supra*, 91 Cal.App.4th at pp. 1158-1159.)

Here, the primary focus here is the denial of an evidentiary hearing under section 388.

The other issues raised in this appeal are not "well-litigated." (*In re William M.*, *supra*, at p. 24, fn. 14.) Significant aspects of the appellate record lack clarity.⁵ Further, this case is procedurally unique. We therefore decline to exercise our discretion to resolve issues rendered moot by subsequent proceedings.

⁵ We cannot determine from our review of the appellate record that the Agency in fact denied Kathleen and William a criminal records exemption. On June 14, 2006, the court sought to clarify the record regarding the Agency's action and directed the social worker to provide "written evidence" concerning the grant or denial of the criminal record exemption for Kathleen. (See Cal. Code Reg., tit. 22, § 89219.1, subd. (e) ["The reasons for any exemption granted or denied shall be in writing and kept by the Department."].) Such evidence is not included in the appellate record, and the social worker's later reports to the court do not clarify the record.

On June 28, 2006, the social worker reported that Kathleen and Williams' home study was complete and had been submitted for management review. The social worker reported the criminal convictions in question were exemptible, but the Agency decided not to place H.G. with Kathleen because of her lack of compliance with the Agency and anger directed at Agency employees. At the proceedings on July 26, the Agency provided an offer of proof that the home study was in progress and had not been approved or disapproved, but it did not intend to place H.G. with Kathleen and William. Kathleen told the court she had not received notice of Agency action "one way or the other." No further representation was made concerning the status of a criminal records exemption.

The Agency argues Kathleen and William had access to an appropriate grievance process and "simply did not take the proper measures" when they filed a section 388 petition instead of seeking administrative review. However, the record suggests Kathleen and William did not have notice in writing of any Agency action. It does not indicate whether Kathleen and William were advised of their right to an administrative review upon proper notice. The Agency's contention and Kathleen and Williams' response do not appear pertinent at this time, and we decline to consider on this record whether the juvenile court has the authority to review Agency action or inaction concerning a criminal records exemption for abuse of discretion. (See *In re Hanna S.* (2004) 118 Cal.App.4th 1087, 1092-1093.)

DISPOSITION

The appeal is dismissed as moot.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.